



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

NOV 13 2018

The Honorable Trey Gowdy
Chairman
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

This letter presents the views of the Department of Justice (“Department”) on H.R. 1272, the Cold Case Record Collections Act of 2017, as revised by an amendment in the nature of the substitute in the House, and S. 3191, the Civil Rights Cold Case Records Collection Act of 2018, as reported by the Senate Committee on Homeland Security and Government Affairs (collectively, “the Cold Case bills”). The Department supports the general aims of the bills, but opposes the bills in their current form due to a number of constitutional and policy concerns. Among other things, the bills would not fully safeguard materials protected by executive privilege, in particular sensitive law enforcement material, and would permit a Review Board composed of individuals improperly appointed and impermissibly shielded from presidential supervision to make decisions about disclosure of such material. The Department would be willing to work with Congress on revising the bills to address the various concerns.

I. Constitutional Concerns

The Cold Case bills are modeled after the President John F. Kennedy Assassination Records Collection Act of 1992, Pub. L. No. 102-256 (“JFK Act”), which created the Assassination Records Review Board, an independent agency charged with the public disclosure of records relating to President Kennedy’s assassination. The Cold Case bills would create an independent agency—the Cold Case Records Review Board (“Board”)—to determine whether to require the public disclosure of records from unsolved civil rights cases. But as President George H.W. Bush explained in signing the JFK Act, such a mandatory-disclosure regime impermissibly encroaches upon the President’s control over information subject to executive privilege. Statement on Signing the President John F. Kennedy Assassination Records Collection Act of 1992 (Oct. 26, 1992), 2 *Pub. Papers of Pres. George Bush* 2004, 2004 (1992–93) (“1992 Signing Statement”). The Cold Case bills would replicate this and other constitutional infirmities.

A. Executive Privilege

1. The bills would intrude on the President's constitutional discretion to determine whether and when to disclose privileged information and would replace the President's judgment with narrow statutory criteria that could mandate the disclosure of large swaths of privileged information. "[I]n order for the President to carry out his constitutional responsibility to enforce the laws, he must be able to protect the confidentiality of certain types of documents and communications within the Executive Branch." *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 115 (1984) ("*Contempt of Congress*"). The Supreme Court has thus recognized that executive privilege is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *United States v. Nixon*, 418 U.S. 683, 708 (1974).

Both bills would require initial determinations regarding the disclosure of cold case records in which neither the President nor the Board would have discretion to withhold information solely because it fell within executive privilege. Instead, they could withhold the information only if the originating agency presented clear evidence that the record satisfied one of the statutory grounds for postponement. H.R. 1272, § 8(c) (disclosure may be postponed if there is "clear and convincing evidence" that it would meet one of the grounds for postponement); S. 3191, § 4 (disclosure may be postponed if it would "clearly and demonstrably be expected" to meet one of the grounds for postponement). But the President may not be prevented from asserting the core constitutional prerogative of executive privilege merely because an agency fails to satisfy an evidentiary burden of proof—let alone one that exceeds the standard of proof in most civil cases.

Furthermore, no matter what the standard of proof, the bills' substantive criteria for withholding records would prevent the President from protecting a vast array of privileged information. Neither bill would allow the Executive to protect information subject to the deliberative process component of executive privilege. That component encompasses "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated"—materials often found in investigative files. *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (internal quotation marks omitted). The JFK Act similarly failed to "contemplate nondisclosure of executive branch deliberations," prompting President Bush to explain that he could not "abdicate [his] constitutional responsibility" to postpone records containing such deliberations "when necessary." 1992 Signing Statement at 2004.

The Cold Case bills would also inadequately protect records subject to the law enforcement component of executive privilege. Executive privilege permits the President to protect investigative files from disclosure. See *Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act*, 10 Op. O.L.C. 68, 75–78 (1986) ("*Response to Congressional Requests*"); *Assertion of Executive Privilege in Response to Congressional Demands for Law Enforcement Files*, 6 Op. O.L.C. 31, 35 (1982). Although not every unsolved case file will contain such sensitive information, the President must retain the discretion to withhold such information when disclosure would interfere with his constitutional responsibility to enforce the law. Both bills, however, would replace the

President's judgment with narrow grounds for withholding records for law enforcement-related reasons. "Cold case records" in both bills refer to "unsolved" cases—i.e., cases that may remain open. H.R. 1272, § 3(2); S. 3191, § 2(2). The Senate bill would permit withholding if disclosure would "interfere with ongoing law enforcement proceedings." S. 3191, § 4(6). However, the House bill would permit agencies to protect the identity of living confidential sources only if disclosure "would pose a substantial risk of harm to that person." H.R. 1272, § 8(c)(2). Under both bills, records could also be withheld if disclosure could "constitute an unwarranted invasion of personal privacy" that would outweigh the public interest in disclosure, *id.* § 8(c)(3); S. 3191, § 5(3), or if disclosure "would compromise the existence of an understanding of confidentiality" between the government and a cooperating individual and would be so harmful that it would outweigh the public interest in disclosure, H.R. 1272, § 8(c)(4); S. 3191, § 5(4). Finally, records could be withheld if disclosure posed a threat to law enforcement "of such gravity that the disclosure outweighs the public interest" and would reveal certain kinds of classified information. H.R. 1272, § 8(c)(1); S. 3191, § 5(1). The limited nature of these exceptions would deprive the Executive Branch of the ability to safeguard privileged information on the often-invoked rationale that disclosure could compromise the integrity of an ongoing investigation. As President Bush emphasized when objecting to similar provisions in the JFK Act, the President's "authority to protect" information protected by executive privilege "comes from the Constitution and cannot be limited by statute." 1992 Signing Statement at 2004.

The Cold Case bills would also unconstitutionally intrude on the President's control over sensitive information bearing on national security, military or intelligence operations, and foreign relations. To be sure, few civil rights cold case records will contain such information. But the bills do not contain a sufficient accommodation for such circumstances and therefore impermissibly restrict the President's authority to control access to or dissemination of such information. The President's "authority to classify and control access to information bearing on national security . . . flows primarily from th[e] constitutional investment of [the Commander in Chief] power in the President," and the "authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief." *Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988). Yet the House bill would allow the withholding of such records only if disclosure posed such a grave threat "to the military defense, . . . intelligence operations, or the conduct of domestic affairs" that it would outweigh the interest in public disclosure and would reveal certain kinds of classified information. H.R. 1272, § 8(c)(1). The Senate bill would allow the withholding of such records only if disclosure would "cause identifiable or describable damage to national security, military defense, . . . intelligence operations, or the conduct of foreign relations that is of such gravity that it outweighs the public interest in disclosure," S. 3191, § 4(1)(A), or would reveal classified information, *id.* § 4(1)(B). Both bills thus may mandate disclosure of even highly classified information if the harm from disclosure would be insufficiently grave or particularized. Faced with similar restrictions in the JFK Act, President Bush deemed the withholding provisions unduly "narrow" and stated that they could not prevent him from exercising his constitutional duty to protect such information as necessary. 1992 Signing Statement at 2004.

Even privileged information that initially fits within a statutory ground for postponement would not be assured of protection. In conjunction with that initial postponement, the Board would have to "designat[e] a recommended specific time at which or a specified occurrence

following which the material may be appropriately disclosed to the public.” H.R. 1272, § 8(k)(1)(B); S. 3191, § 7(c)(3)(B). That provision would appear to require the Board to identify a future time when disclosure should occur. Consequently, that recommendation would then bind originating agencies and the Archivist on every round of re-review. H.R. 1272, § 5(c)(1); S. 3191, § 3(f)(1). To the extent this provision required the Board to select a future date or occurrence that would warrant disclosure and required the originating agency or the Archivist to disclose the record once that date or occurrence transpired, this provision would inadequately protect privileged information.

Finally, the House bill would mandate disclosure of all cold case records within 25 years unless “continued postponement is made necessary by an identifiable harm to military defense, law enforcement, intelligence operations, or the conduct of foreign relations that is of such gravity that it outweighs the public interest in disclosure.” H.R. 1272, § 5(d)(1)(A). The Senate bill would mandate disclosure within 25 years unless it would “clearly and demonstrably be expected to . . . cause identifiable or describable damage to national security, military defense, law enforcement, intelligence operations, or the conduct of foreign relations that is of such gravity that it outweighs the public interest in disclosure,” S. 3191, § 4(f)(4)(A)(i)(I), or would reveal classified information, *id.* § 4(f)(4)(A)(i)(II). In some circumstances, the requirement of “identifiable” or “describable” harm might not sufficiently protect privileged information. *Cf. Temporary Certification*, 41 Op. O.L.C. ___, at *8–15.

2. Both bills would also unconstitutionally interfere with the President’s authority to determine whether privileged information may be disclosed within the Executive Branch or to Congress. Congress may not “act to prohibit the supervision [by the President] of the disclosure of any privileged information, be it classified, deliberative process or other privileged material.” *Authority of Agency Officials to Prohibit Employees From Providing Information to Congress*, 28 Op. O.L.C. 79, 80–81 (2004). But, like the JFK Act, these bills would disable the President from controlling the dissemination of privileged information. First, both bills would authorize the Board to compel agency heads to provide civil rights cold case records “without any redaction, adjustment, or withholding under the standards of this Act,” H.R. 1272, § 5(a)(1); S. 3191, § 3(e)(1)(A), and to turn over any record “which the . . . Board has reason to believe is required to fulfill its functions and responsibilities,” H.R. 1272, § 6(c)(1)(B); S. 3191, § 5(i)(1)(B). But decisions about when, how, and to whom to disseminate such sensitive information are central to the President’s authority to supervise and manage the Executive Branch. *See Access to Classified Information*, 20 Op. O.L.C. 402, 404 (1996).

Second, both bills would give congressional committees “access to any records” the Board “held or created.” H.R. 1272, § 6(k)(1); S. 3191, § 5(k)(1). Such records would presumably include any records the Board obtained from other agencies to conduct its investigations and records of the Board’s decision-making process. These records would likely contain a wide range of privileged information. President Bush thus objected to the constitutionality of a similar provision in the JFK Act. *See* 1992 Signing Statement at 2004–05.

B. Appointments

Both bills also raise significant concerns under the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, and the separation of powers. The Appointments Clause sets forth the respective roles of the President and Congress in appointing “Officers of the United States,” those officials who “exercis[e] significant authority pursuant to the laws of the United States” and “occup[y] a continuing position established by law.” *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018) (internal quotation marks omitted). Members of the Board would qualify as principal officers, for whom “[t]he President has the sole power of nomination; the Senate has the sole power of consent.” 1992 Signing Statement at 2005. As President Bush noted in signing the JFK Act, the provisions “purport[ing] to set the qualifications for Board members, to require the President to review lists supplied by specified organizations, and to direct the timing of nominations” would impermissibly interfere with the President’s constitutional appointment authority. *Id.* The Senate bill would replicate those restrictions and thus violate the Appointments Clause. The House bill would instead provide that four of the five Board members are to be appointed by leaders of Congress and that the fifth Board member is to be appointed by the President alone. None of those methods is a permissible means of appointing a principal officer. The appointment of executive branch officials by members of Congress would additionally violate the anti-aggrandizement principle of the separation of powers.

1. Board members would plainly be Officers of the United States. Board members would satisfy the first criterion of officer status because they would exercise “significant authority pursuant to the laws of the United States” by exercising functions “within the ‘executive Power’ that Article II of the Constitution confers, functions in which no mere private party would be authorized to engage.” *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 90 (2007) (“*Officers of the United States*”). Board members would not only have the authority to disseminate or disclose confidential information otherwise subject to executive privilege, but could also exercise that power in a way that would “bind third parties, or the government itself, for the public benefit.” *Id.* at 87. In the Senate bill, the President could review the Board’s initial disclosure or postponement determinations only with respect to executive branch records, so the Board’s decisions would be final and binding for all other records. *See* S. 3191, § 7(d)(1). The House bill is less clear; it would limit presidential review to “a determination [of the Review Board] developed or obtained solely within the executive branch.” H.R. 1272, § 8(g)(1). If this unclear provision also intended to limit presidential review to executive branch cold case records, the Board’s decision would again be final and binding for all non-executive branch cold case records. In addition, if the President failed to review the Board’s determinations concerning executive branch records within 30 days, those determinations would go into immediate effect. *See id.* This “last-word capacity” with respect to such determinations is sufficient, though not necessary, to establish officer status. *Lucia*, 138 S. Ct. at 2054. The bills would also give the Board the power to “issue interpretive regulations.” H.R. 1272, § 6(m); S. 3191, § 5(m). Such a power to “interpret the law” constitutes the exercise of significant authority. *Officers of the United States*, 31 Op. O.L.C. at 87; *see Bowsher v. Synar*, 478 U.S. 714, 733 (1986).

Board members would also satisfy the second criterion of officer status: they would occupy continuing positions established by law. *See Lucia*, 138 S. Ct. at 2051. They would have

continuous duties, set forth in the bills, to decide whether to publicly disclose governmental records. The fact that the Board would terminate in three to four years, H.R. 1272, § 6(n)(1), or four to five years, S. 3191, § 5(n)(1), would not detract from the continuing nature of their statutory responsibilities during those terms. *See Constitutionality of the Ronald Reagan Centennial Commission Act of 2009*, 33 Op. O.L.C. ___, *2 (Apr. 21, 2009).

2. Because Board members would be principal officers, the Constitution requires that they be appointed by the President with the advice and consent of the Senate. U.S. Const. art. II, § 2, cl. 2. The Appointments Clause divides officers between principal officers—who are supervised and removed directly by the President—and inferior officers, “whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.” *Edmond v. United States*, 520 U.S. 651, 663 (1997). The Board members would be principal officers, because they would be subject to supervision and removal by the President alone, and they could render final decisions without the approval of anyone else (in some cases, even without the approval of the President). *Edmond*, 520 U.S. at 664–65.

The Constitution constrains Congress’s authority to impose limits upon the candidates whom the President may nominate as principal officers. “The only congressional check that the Constitution places on the President’s power to appoint ‘principal officers’ is the advice and consent of the Senate.” *Common Legislative Encroachments on Executive Branch Authority*, 13 Op. O.L.C. 248, 250 (1989) (“*Common Legislative Encroachments*”); *see Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 487 (1989) (Kennedy, J., concurring in the judgment) (“No role whatsoever is given either to the Senate or to Congress as a whole in the process of choosing the person who will be nominated for [the] appointment.”). The Constitution requires sufficient “scope for the judgment and will of the person or body in whom the Constitution vests the power of appointment”—here, the President. *Civil-Service Commission*, 13 Op. Att’y Gen. 516, 520–21 (1871). Further, the President must have particular leeway in choosing principal officers whose duties implicate sensitive executive functions. *See Constitutionality of Statute Governing Appointment of United States Trade Representative*, 20 Op. O.L.C. 279, 280–81 (1996) (finding it unconstitutional to bar anyone who directly represented a foreign entity in a trade dispute from being the U.S. Trade Representative). The Senate has the constitutional authority to review and approve the President’s nominees, but Congress may not otherwise impose qualification requirements that unduly constrain his discretion.

3. The Cold Case bills, however, would violate these constitutional principles. The Senate bill would provide for appointment by the President with the advice and consent of the Senate, but it would attach a litany of restrictions on candidates for the Board that, like the JFK Act, would unconstitutionally impair the President’s options in selecting nominees. Congress would exclude many experienced prosecutors and law enforcement professionals from membership, because prior involvement in *any* federal, state, or local “investigation or inquiry . . . relating to any civil rights cold case” would be disqualifying. S. 3191, § 5(b)(3)(A). Nominees would have to be “distinguished individuals of high national professional reputation in their respective fields.” *Id.* § 5(b)(3)(B). At least one of the five Board members would have to be a professional historian, while another would have to be a lawyer. *Id.* § 5(b)(3)(C). Nominees must also be “capable of exercising [] independent and objective judgment” and must

“possess an appreciation of the value of [cold case records] to the public, scholars, and government.” *Id.* § 5(b)(3)(B).

Taken together, these criteria would leave the President with insufficient discretion to appoint the principal officers charged with the task of deciding whether to disclose potentially sensitive government records. The President would be barred from selecting from perhaps the most knowledgeable pool of individuals: anyone who was involved in any way in a previous investigation involving a civil rights cold case, at any level of government. And the President’s discretion to choose professionals from other relevant fields would be circumscribed by the requirements to choose a lawyer and a historian for two of the Board’s five seats, on top of other requirements. The JFK Act imposed these same restrictions on membership of the Assassination Records Review Board, and President Bush objected that those qualification restrictions interfered with his authority to select appropriate principal officers under the Appointments Clause. 1992 Signing Statement at 2005.

The House bill would compound these constitutional problems. Principal officers like the Board’s members may be appointed only by the President with the Senate’s consent. U.S. Const. art. II, § 2, cl. 2. Yet the House bill would prescribe that one Board member is to be appointed by the President alone and the remaining four members are to be appointed by leaders of Congress—the Speaker of the House, the House Minority Leader, the Senate Majority Leader, and the Senate Minority Leader. H.R. 1272, § 6(d)(1)(A)–(E). Allowing members of Congress to appoint members of a Board that is part of the Executive Branch would also independently violate the separation of powers because Congress is constitutionally prohibited from appointing anyone who would exercise executive power. *See Bowsher v. Synar*, 478 U.S. 714, 726 (1986). As drafted, the House bill would impose restrictive qualifications, require consideration of the recommendations of private citizens, and set tight time limits on appointments. *Id.* § 6(d)(2)–(3). These appointment mechanisms all would violate the Appointments Clause.

Finally, and similar to the JFK Act, the House bill would impermissibly dictate the timing of presidential nominations. Before selecting Board members, both bills would provide that the appointing authority shall receive lists of candidates “recommended by the American Historical Association, the Organization of American Historians, the Society of American Archivists, and the American Bar Association,” which would have at least 60 days to submit recommendations. H.R. 1272, § 6(b)(2)(B)–(C); S. 3191, § 5(b)(2)(B)–(C) (60 days, extendible for up to another 60 days). The Senate bill would provide that the President “may consider” these candidates for nomination to the Senate and thus would not constrain the President’s appointment authority. But the House bill would provide that the appointment official—either a member of Congress or the President—“shall consider” these candidates. H.R. 1272, § 6(b)(2)(B); S. 3191, § 5(b)(2)(B). The appointment power would therefore be conditioned and delayed upon the actions of private groups. Even if the House were to fix the appointment mechanism in its bill to provide for appointment by the President with the advice and consent of the Senate, this restriction would be unconstitutional. *See* 1992 Signing Statement at 2005. Congress may not constitutionally require the President to wait upon an appointment until after he has received recommendations from other members of the Executive Branch. The intrusion here would be even greater: the President would have no ability to supervise the private groups suggesting appointees, and thus would lack even indirect means of influencing the timing of their recommendations.

C. Removals

Both bills would also unconstitutionally restrict the President's authority to supervise the Executive Branch by prohibiting the President from removing Board members absent cause. See H.R. 1272, § 6(h)(1)(B) (authorizing the President to remove Board members only for "inefficiency, neglect of duty, or malfeasance in office"); S. 3191, § 5(f)(1)(B) (authorizing the President to remove Board members only for "inefficiency, neglect of duty, malfeasance in office, physical disability, mental incapacity, or any other condition that substantially impairs the performance of the member's duties"). Congress may not impose removal restrictions on officers if those restrictions would unduly interfere with the President's exercise of a core Article II function. See *Morrison v. Olson*, 487 U.S. 654, 689–90 (1988); *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 169 (1996) ("*Separation of Powers*"). "[R]estrictions on the President's power to remove officers with broad policy responsibilities in areas Congress does not or cannot shelter from presidential policy control clearly should be deemed unconstitutional." *Separation of Powers*, 20 Op. O.L.C. at 169.

The President's constitutional obligation to execute the laws carries with it the authority to remove executive officers. "Because the power to remove is the power to control, restrictions on removal power strike at the heart of the President's power to direct the executive branch and perform his constitutional duties." *Common Legislative Encroachments*, 13 Op. O.L.C. at 252. The Supreme Court held in *Myers v. United States*, 272 U.S. 52 (1926), that the President's "power of removal" is "an indispensable aid" to his ability to meet his "responsib[ility] under the Constitution for the effective enforcement of the law." *Id.* at 132–33. And in *Morrison v. Olson*, 487 U.S. 654 (1988), the Court stated that "*Myers* was undoubtedly correct in its holding, and in its broader suggestion that there are some 'purely executive' officials who must be removable by the President at will if he is to be able to accomplish his constitutional role." *Id.* at 690.

The removal restrictions proposed in the bills would interfere with the President's core constitutional prerogative to decide whether to disclose information subject to executive privilege. Instead of leaving such decisions to the President, both bills would vest those decisions in a Board that would solely answer to the President and whose members could be removed only for specified causes. "Congress may not . . . provide Executive Branch employees with independent authority to countermand or evade the President's determinations as to when it is lawful and appropriate to disclose classified information," let alone all other types of privileged information. *Applicability of the Foreign Intelligence Surveillance Act's Notification Provision to Security Clearance Adjudications by the Department of Justice Access Review Committee*, 35 Op. O.L.C. ___, at *8 (June 3, 2011). That is why the Supreme Court emphasized the extent of presidential supervision over the General Services Administration when approving of legislation giving that agency responsibility for former President Nixon's records, which included privileged materials. *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443–44 (1977). The Court explained that professional archivists' review of former Presidents' records "constitute[d] a very limited intrusion by personnel in the Executive Branch sensitive to executive concerns," *id.* at 451, in light of their supervision by the Administrator of General Services, who was "himself an official of the Executive Branch, appointed by the President," *id.* at 441, "subject to the direction and control of the President," and freely removable by the President, 40 U.S.C.

§ 302. Congress may not insulate Executive Branch decision-makers exercising core executive functions from plenary presidential supervision.

The removal restrictions here differ from those instances where the Supreme Court has upheld limited restrictions on the President's authority to remove principal officers. As the Supreme Court recently recognized in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 493 (2010), the Court has upheld for-cause removal restrictions on principal officers who perform "quasi-legislative" and "quasi-judicial functions." *See id.* (citing *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935)); *see also Wiener v. United States*, 357 U.S. 349 (1958) (holding that Congress could insulate members of a War Claims Commission from at-will removal because their work had an "intrinsic judicial character"). Those cases, however, do not apply to members of the Board, who exercise "purely executive functions." *Humphrey's Ex'r*, 295 U.S. at 627; *see also Separation of Powers*, 20 Op. O.L.C. at 169–70. The Board members' authority to review and disclose confidential Executive Branch information directly relate to the President's execution of the laws, and therefore, must ultimately be exercised only by officers subject to direct presidential control. Congress may not use removal restrictions on principal officers such as the Board members as an indirect means of compromising the President's control over this core executive function. *Cf. Morrison*, 487 U.S. at 695–96 (allowing "good cause" removal restriction on independent counsel even though she exercised executive power, because she was an inferior officer with a narrow ambit); *Free Enter. Fund*, 561 U.S. at 495 (emphasizing that *Morrison* concerned the "status of inferior officers" and the specific "circumstances" of the independent-counsel statute).

II. Policy Concerns

The proposed legislation sets forth a presumption of disclosure, as well as mechanisms to ensure disclosure, of all civil-rights era cold case records. In addition to the constitutional issues discussed above, there are other significant hurdles (*e.g.*, statutory, evidentiary, or policy-based) to releasing fulsome records to the public on cold cases. For example, (1) information involving juveniles is generally sealed, even long after the proceedings have ended; (2) release of certain information that could present a victim in an unfavorable light (whether the allegation about the victim is true or false) might be precluded by the Crime Victims' Rights Act, and other statements might impinge on the privacy concerns of the family of a victim; (3) release of Personally Identifiable Information, while old, could nonetheless result in identity theft or other issues, and it is Department policy not to release such information; and (4) release of information might pose a security risk to subjects, witnesses, or their descendants.

A. Undue Burden and Limited Resources

This legislation would place an undue burden on Department of Justice's Civil Rights Division employees and divert limited staff resources from mission-critical work to meet the cumbersome deadlines set forth in the Act. The Senate bill would provide two years to transmit to the National Archives all cold case records that can be disclosed, S. 3191, § 3(e)(1), but the House bill would provide only 300 days, H.R. 1292, § 5(a)(1). This would require attorneys in the Criminal Section of the Civil Rights Division to immediately review voluminous materials in all potential cold case records to identify whether they are appropriate for disclosure or qualify

for an exception. Any record exempted from disclosure must then be re-reviewed or re-redacted not later than December 31 of each year. H.R. 1292, § 5(c)(1); S. 3191, § 3(f)(1). Explanations for why records are not disclosed are required to be published in the Federal Register, which is a long and burdensome process. Absent the grant of additional resources and personnel, compliance with this legislation would require the Civil Rights Division to divert limited resources from the criminal enforcement of civil rights statutes, including the important task of investigating and prosecuting modern-day hate crimes.

B. Public Disclosure of Records under Freedom of Information Act

Section 2 of the House bill mischaracterizes the realities of the Freedom of Information Act ("FOIA"). Section 2 of the House bill states: "Legislation is necessary because section 552 of title 5, United States Code (commonly known as the Freedom of Information Act), as implemented by the executive branch, has prevented the timely and adequate public disclosure of records relating to civil rights cold cases." H.R. 1272, § 2(5). FOIA was designed to ensure an informed citizenry, but it simultaneously recognizes that there is a need to balance the right of the public to know with the need for the government to protect certain information. The Privacy Act and FOIA provide important protections, particularly for witnesses and victims of crimes, who may not want their identities known and made machine-readable and searchable on the Internet indefinitely. In disseminating information involving privacy interests of citizens, FOIA must ensure balancing the public's right to know with the interest in protecting information.

C. Definition of Civil Rights Cold Case Records

The definition of Civil Rights Cold Case Records in the Senate bill includes records related to Civil Rights Cold Cases "created or made available for use by, obtained by, or otherwise came into the possession of" Federal agencies and also "any State or local government, or component thereof, that provided support or assistance or performed work in conjunction with a Federal inquiry into Civil Rights Cold Cases." S. 3191, § 2(3)(B). The reach into records that came into the possession of State and local authorities that supported Federal inquiries may raise implementation questions.

D. Required Disclosure After 25 Years

As noted, both bills would require disclosure of all cold case records not later than 25 years after the Act's enactment except in limited circumstances. H.R. 1272, § 5(d)(1); S. 3191, § 3(f)(4). In addition to the constitutional issues identified above, these sections do not take into account domestic privacy concerns and do not reference applicable federal rules, federal statutes, or official Attorney General guidance prohibiting disclosure of certain information. Rather, the House bill would exclude cold case records from the timed disclosure requirement only if disclosure would cause "identifiable harm to military defense, law enforcement, intelligence operations, or the conduct of foreign relations that is of such gravity that the identifiable harm outweighs the public interest in disclosure." H.R. 1272, § 5(d)(1)(A). The Senate bill would exclude cold case records from the time disclosure requirement only if disclosure "would clearly and demonstrably be expected to—(I) cause identifiable or describable damage to national security, military defense, law enforcement, intelligence operations, or the conduct of foreign

relations that is such gravity that it outweighs the public interest in disclosure; or (II) reveal classified information.” S. 3191, § 3(f)(4)(A)(i). This can be particularly problematic in instances where individuals involved in civil rights investigations are still alive. This may be the case if the crime occurred when a witness or victim was a child. The witness or victim may not want their personal information or involvement in an inquiry known, including for example, witnesses and victims of crimes who could be subject to harassment or retaliation.

It is our position that applicable federal statutes, federal rules, official Attorney General guidance, court recognized privileges and legal precedent, and existing FOIA procedures governing disclosure already reflect a determination that the harm resulting from disclosure outweighs the public interest in disclosure. The proposed legislation contravenes the Department’s interests by taking decisions out of the hands of either the Department or a court that has experience in weighing competing interests and instead places decision authority with an independent Review Board. Furthermore, Congress already weighed government interests against the public’s need to know when enacting FOIA. Through FOIA, “Congress sought ‘to reach a workable balance between the right of the public to know and the need of the Government’” to protect certain information, and the FOIA’s “broad provisions favoring disclosure, coupled with the specific exemptions, reveal and present the ‘balance’ Congress has struck.” *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152–53 (1989).

E. FOIA Exemption (b)(6)—Grounds for Postponement of Public Disclosure of Records

The House bill would allow postponement of public disclosure of cold case records when “there is clear and convincing evidence that . . . [t]he public disclosure of the cold case record could reasonably be expected to constitute an unwarranted invasion of personal privacy, and that invasion of privacy is so substantial that the protection of privacy outweighs the public interest.” H.R. 1272, § 8(c)(3). The Senate bill would allow postponement when “disclosure would clearly and demonstrably be expected to . . . constitute an unwarranted invasion of personal privacy.” S. 3191, § 4(3).

The agencies and courts are quite familiar with FOIA exemption (b)(6), for information whose disclosure “would constitute a clearly unwarranted invasion of personal privacy,” and exemption (b)(7)(C), for information compiled for law enforcement purposes whose disclosure “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” FOIA and the Privacy Act already require a balancing of protection of privacy and the public interest, as established in court cases for decades. The House bill additional language—that the invasion of privacy be “so substantial” that privacy protection outweighs the public interest—is unnecessary and would cause confusion and potentially unnecessarily conflicting opinions in the agencies, with the Archivist, the Cold Case Records Review Board, and the courts.

The “clear and convincing evidence” standard in the House bill also would cause confusion. The House bill does not adequately explain the definition of “clear and convincing evidence” in which a record “could reasonably be expected” to constitute an unwarranted invasion of personal privacy. It could be argued that the clear and convincing evidence standard conflicts with, and renders ineffective, the “reasonably be expected” language.

F. Grand Jury Material

With respect to grand jury material, the government has adhered to a litigating position that grand jury material may not be disclosed simply because it is old and of interest to a scholar or the public at large. Brief for Appellant, *Pitch v. United States*, No. 17-15016 (11th Cir. filed Feb. 2, 2018); Corrected Brief for Respondent-Appellant United States of America, *Carlson v. United States*, 837 F.3d 753 (7th Cir. 2016) (No. 15-2972), 2015 WL 8069332; Department of Justice's Opposition to Petitioner's Motion for Release of Grand Jury Material in the Matter of *United States v. John Joseph Frank*, No. 493-57 (D.D.C. 1957, 1959), *McKeever v. Holder*, No. 13-00054 (D.D.C. filed June 3, 2013). The government's position is that disclosure of grand jury material on the basis of scholarly or public interest is not grounded in Federal Rule of Criminal Procedure Rule 6(e). The proposed legislation would release grand jury materials where there is a particularized need for the material, undermining this position. The government has previously proposed amending Rule 6(e) to allow disclosure of such information, but it is the government's position that Rule 6(e) should incorporate a balancing test, which takes into consideration the interests of all affected parties, to ensure that the goals of the rule are met.

G. Rules of Construction

Both bills state that, when the Act requires transmission of a record to National Archives and Records Administration for public disclosure, "it shall take precedence over any other law, . . . judicial decisions construing such law, or common law doctrine that would otherwise prohibit such transgression or disclosure." The bills appear to have been drafted based on concerns that the Executive Branch has not released civil rights cold case records in a timely and adequate manner. H.R. 1272, § 10(a); S. 3191, § 9(a)(1). The House bill specifically refers to FOIA as one reason for these issues. See H.R. 1272, § 2(5). As stated above, the Privacy Act and FOIA are tools to protect private information of witnesses and victims of crimes, who may not want their identities known and made machine-readable and searchable on the Internet indefinitely.

H. Uncertainty of Future Requests

Finally, enactment of such a bill may well be the first slide down a "slippery slope." Civil rights cold cases are very often of particular and intense interest to the country and the public; however, other kinds of cases, such as those involving wide-scale public corruption, terrorism, or historically high-profile crimes, are likely also to be of interest. That might include, in the civil rights context, requests to review cases alleging police misconduct that were not prosecuted. Were this legislation to take effect, we fear that there may well be future requests to access law enforcement or investigative records in other kinds of cases until there is no presumption left that the secrecy of an investigation must be maintained unless a defendant is indicted. Instead, everyone would be aware that, in time, information would become public. Once this precedent is established, there would be increasing requests to move up the time frame for release, thus undermining the secrecy surrounding criminal investigations that is both necessary to their success and that protect persons who are not indicted from any stigma that might attach to their having been investigated.

Thank you for the opportunity to present our views. The Department of Justice looks forward to working with the Committee to address these concerns. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to the submission of this letter.

Sincerely,

A handwritten signature in black ink that reads "Prim Escalona". The signature is written in a cursive, flowing style.

Prim F. Escalona
Principal Deputy Assistant Attorney General



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

NOV 13 2018

The Honorable Ron Johnson
Chairman
Committee on Homeland Security
and Governmental Affairs
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

This letter presents the views of the Department of Justice (“Department”) on H.R. 1272, the Cold Case Record Collections Act of 2017, as revised by an amendment in the nature of the substitute in the House, and S. 3191, the Civil Rights Cold Case Records Collection Act of 2018, as reported by the Senate Committee on Homeland Security and Governmental Affairs (collectively, “the Cold Case bills”). The Department supports the general aims of the bills, but opposes the bills in their current form due to a number of constitutional and policy concerns. Among other things, the bills would not fully safeguard materials protected by executive privilege, in particular sensitive law enforcement material, and would permit a Review Board composed of individuals improperly appointed and impermissibly shielded from presidential supervision to make decisions about disclosure of such material. The Department would be willing to work with Congress on revising the bills to address the various concerns.

I. Constitutional Concerns

The Cold Case bills are modeled after the President John F. Kennedy Assassination Records Collection Act of 1992, Pub. L. No. 102-256 (“JFK Act”), which created the Assassination Records Review Board, an independent agency charged with the public disclosure of records relating to President Kennedy’s assassination. The Cold Case bills would create an independent agency—the Cold Case Records Review Board (“Board”)—to determine whether to require the public disclosure of records from unsolved civil rights cases. But as President George H.W. Bush explained in signing the JFK Act, such a mandatory-disclosure regime impermissibly encroaches upon the President’s control over information subject to executive privilege. Statement on Signing the President John F. Kennedy Assassination Records Collection Act of 1992 (Oct. 26, 1992), 2 *Pub. Papers of Pres. George Bush* 2004, 2004 (1992–93) (“1992 Signing Statement”). The Cold Case bills would replicate this and other constitutional infirmities.

A. Executive Privilege

1. The bills would intrude on the President's constitutional discretion to determine whether and when to disclose privileged information and would replace the President's judgment with narrow statutory criteria that could mandate the disclosure of large swaths of privileged information. "[I]n order for the President to carry out his constitutional responsibility to enforce the laws, he must be able to protect the confidentiality of certain types of documents and communications within the Executive Branch." *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 115 (1984) ("*Contempt of Congress*"). The Supreme Court has thus recognized that executive privilege is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *United States v. Nixon*, 418 U.S. 683, 708 (1974).

Both bills would require initial determinations regarding the disclosure of cold case records in which neither the President nor the Board would have discretion to withhold information solely because it fell within executive privilege. Instead, they could withhold the information only if the originating agency presented clear evidence that the record satisfied one of the statutory grounds for postponement. H.R. 1272, § 8(c) (disclosure may be postponed if there is "clear and convincing evidence" that it would meet one of the grounds for postponement); S. 3191, § 4 (disclosure may be postponed if it would "clearly and demonstrably be expected" to meet one of the grounds for postponement). But the President may not be prevented from asserting the core constitutional prerogative of executive privilege merely because an agency fails to satisfy an evidentiary burden of proof—let alone one that exceeds the standard of proof in most civil cases.

Furthermore, no matter what the standard of proof, the bills' substantive criteria for withholding records would prevent the President from protecting a vast array of privileged information. Neither bill would allow the Executive to protect information subject to the deliberative process component of executive privilege. That component encompasses "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated"—materials often found in investigative files. *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (internal quotation marks omitted). The JFK Act similarly failed to "contemplate nondisclosure of executive branch deliberations," prompting President Bush to explain that he could not "abdicate [his] constitutional responsibility" to postpone records containing such deliberations "when necessary." 1992 Signing Statement at 2004.

The Cold Case bills would also inadequately protect records subject to the law enforcement component of executive privilege. Executive privilege permits the President to protect investigative files from disclosure. See *Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act*, 10 Op. O.L.C. 68, 75–78 (1986) ("*Response to Congressional Requests*"); *Assertion of Executive Privilege in Response to Congressional Demands for Law Enforcement Files*, 6 Op. O.L.C. 31, 35 (1982). Although not every unsolved case file will contain such sensitive information, the President must retain the discretion to withhold such information when disclosure would interfere with his constitutional responsibility to enforce the law. Both bills, however, would replace the

President's judgment with narrow grounds for withholding records for law enforcement-related reasons. "Cold case records" in both bills refer to "unsolved" cases—i.e., cases that may remain open. H.R. 1272, § 3(2); S. 3191, § 2(2). The Senate bill would permit withholding if disclosure would "interfere with ongoing law enforcement proceedings." S. 3191, § 4(6). However, the House bill would permit agencies to protect the identity of living confidential sources only if disclosure "would pose a substantial risk of harm to that person." H.R. 1272, § 8(c)(2). Under both bills, records could also be withheld if disclosure could "constitute an unwarranted invasion of personal privacy" that would outweigh the public interest in disclosure, *id.* § 8(c)(3); S. 3191, § 5(3), or if disclosure "would compromise the existence of an understanding of confidentiality" between the government and a cooperating individual and would be so harmful that it would outweigh the public interest in disclosure, H.R. 1272, § 8(c)(4); S. 3191, § 5(4). Finally, records could be withheld if disclosure posed a threat to law enforcement "of such gravity that the disclosure outweighs the public interest" and would reveal certain kinds of classified information. H.R. 1272, § 8(c)(1); S. 3191, § 5(1). The limited nature of these exceptions would deprive the Executive Branch of the ability to safeguard privileged information on the often-invoked rationale that disclosure could compromise the integrity of an ongoing investigation. As President Bush emphasized when objecting to similar provisions in the JFK Act, the President's "authority to protect" information protected by executive privilege "comes from the Constitution and cannot be limited by statute." 1992 Signing Statement at 2004.

The Cold Case bills would also unconstitutionally intrude on the President's control over sensitive information bearing on national security, military or intelligence operations, and foreign relations. To be sure, few civil rights cold case records will contain such information. But the bills do not contain a sufficient accommodation for such circumstances and therefore impermissibly restrict the President's authority to control access to or dissemination of such information. The President's "authority to classify and control access to information bearing on national security . . . flows primarily from th[e] constitutional investment of [the Commander in Chief] power in the President," and the "authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief." *Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988). Yet the House bill would allow the withholding of such records only if disclosure posed such a grave threat "to the military defense, . . . intelligence operations, or the conduct of domestic affairs" that it would outweigh the interest in public disclosure and would reveal certain kinds of classified information. H.R. 1272, § 8(c)(1). The Senate bill would allow the withholding of such records only if disclosure would "cause identifiable or describable damage to national security, military defense, . . . intelligence operations, or the conduct of foreign relations that is of such gravity that it outweighs the public interest in disclosure," S. 3191, § 4(1)(A), or would reveal classified information, *id.* § 4(1)(B). Both bills thus may mandate disclosure of even highly classified information if the harm from disclosure would be insufficiently grave or particularized. Faced with similar restrictions in the JFK Act, President Bush deemed the withholding provisions unduly "narrow" and stated that they could not prevent him from exercising his constitutional duty to protect such information as necessary. 1992 Signing Statement at 2004.

Even privileged information that initially fits within a statutory ground for postponement would not be assured of protection. In conjunction with that initial postponement, the Board would have to "designat[e] a recommended specific time at which or a specified occurrence

following which the material may be appropriately disclosed to the public.” H.R. 1272, § 8(k)(1)(B); S. 3191, § 7(c)(3)(B). That provision would appear to require the Board to identify a future time when disclosure should occur. Consequently, that recommendation would then bind originating agencies and the Archivist on every round of re-review. H.R. 1272, § 5(c)(1); S. 3191, § 3(f)(1). To the extent this provision required the Board to select a future date or occurrence that would warrant disclosure and required the originating agency or the Archivist to disclose the record once that date or occurrence transpired, this provision would inadequately protect privileged information.

Finally, the House bill would mandate disclosure of all cold case records within 25 years unless “continued postponement is made necessary by an identifiable harm to military defense, law enforcement, intelligence operations, or the conduct of foreign relations that is of such gravity that it outweighs the public interest in disclosure.” H.R. 1272, § 5(d)(1)(A). The Senate bill would mandate disclosure within 25 years unless it would “clearly and demonstrably be expected to . . . cause identifiable or describable damage to national security, military defense, law enforcement, intelligence operations, or the conduct of foreign relations that is of such gravity that it outweighs the public interest in disclosure,” S. 3191, § 4(f)(4)(A)(i)(I), or would reveal classified information, *id.* § 4(f)(4)(A)(i)(II). In some circumstances, the requirement of “identifiable” or “describable” harm might not sufficiently protect privileged information. *Cf. Temporary Certification*, 41 Op. O.L.C. ___, at *8–15.

2. Both bills would also unconstitutionally interfere with the President’s authority to determine whether privileged information may be disclosed within the Executive Branch or to Congress. Congress may not “act to prohibit the supervision [by the President] of the disclosure of any privileged information, be it classified, deliberative process or other privileged material.” *Authority of Agency Officials to Prohibit Employees From Providing Information to Congress*, 28 Op. O.L.C. 79, 80–81 (2004). But, like the JFK Act, these bills would disable the President from controlling the dissemination of privileged information. First, both bills would authorize the Board to compel agency heads to provide civil rights cold case records “without any redaction, adjustment, or withholding under the standards of this Act,” H.R. 1272, § 5(a)(1); S. 3191, § 3(e)(1)(A), and to turn over any record “which the . . . Board has reason to believe is required to fulfill its functions and responsibilities,” H.R. 1272, § 6(c)(1)(B); S. 3191, § 5(i)(1)(B). But decisions about when, how, and to whom to disseminate such sensitive information are central to the President’s authority to supervise and manage the Executive Branch. *See Access to Classified Information*, 20 Op. O.L.C. 402, 404 (1996).

Second, both bills would give congressional committees “access to any records” the Board “held or created.” H.R. 1272, § 6(k)(1); S. 3191, § 5(k)(1). Such records would presumably include any records the Board obtained from other agencies to conduct its investigations and records of the Board’s decision-making process. These records would likely contain a wide range of privileged information. President Bush thus objected to the constitutionality of a similar provision in the JFK Act. *See* 1992 Signing Statement at 2004–05.

B. Appointments

Both bills also raise significant concerns under the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, and the separation of powers. The Appointments Clause sets forth the respective roles of the President and Congress in appointing “Officers of the United States,” those officials who “exercis[e] significant authority pursuant to the laws of the United States” and “occup[y] a continuing position established by law.” *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018) (internal quotation marks omitted). Members of the Board would qualify as principal officers, for whom “[t]he President has the sole power of nomination; the Senate has the sole power of consent.” 1992 Signing Statement at 2005. As President Bush noted in signing the JFK Act, the provisions “purport[ing] to set the qualifications for Board members, to require the President to review lists supplied by specified organizations, and to direct the timing of nominations” would impermissibly interfere with the President’s constitutional appointment authority. *Id.* The Senate bill would replicate those restrictions and thus violate the Appointments Clause. The House bill would instead provide that four of the five Board members are to be appointed by leaders of Congress and that the fifth Board member is to be appointed by the President alone. None of those methods is a permissible means of appointing a principal officer. The appointment of executive branch officials by members of Congress would additionally violate the anti-aggrandizement principle of the separation of powers.

1. Board members would plainly be Officers of the United States. Board members would satisfy the first criterion of officer status because they would exercise “significant authority pursuant to the laws of the United States” by exercising functions “within the ‘executive Power’ that Article II of the Constitution confers, functions in which no mere private party would be authorized to engage.” *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 90 (2007) (“*Officers of the United States*”). Board members would not only have the authority to disseminate or disclose confidential information otherwise subject to executive privilege, but could also exercise that power in a way that would “bind third parties, or the government itself, for the public benefit.” *Id.* at 87. In the Senate bill, the President could review the Board’s initial disclosure or postponement determinations only with respect to executive branch records, so the Board’s decisions would be final and binding for all other records. *See* S. 3191, § 7(d)(1). The House bill is less clear; it would limit presidential review to “a determination [of the Review Board] developed or obtained solely within the executive branch.” H.R. 1272, § 8(g)(1). If this unclear provision also intended to limit presidential review to executive branch cold case records, the Board’s decision would again be final and binding for all non-executive branch cold case records. In addition, if the President failed to review the Board’s determinations concerning executive branch records within 30 days, those determinations would go into immediate effect. *See id.* This “last-word capacity” with respect to such determinations is sufficient, though not necessary, to establish officer status. *Lucia*, 138 S. Ct. at 2054. The bills would also give the Board the power to “issue interpretive regulations.” H.R. 1272, § 6(m); S. 3191, § 5(m). Such a power to “interpret the law” constitutes the exercise of significant authority. *Officers of the United States*, 31 Op. O.L.C. at 87; *see Bowsher v. Synar*, 478 U.S. 714, 733 (1986).

Board members would also satisfy the second criterion of officer status: they would occupy continuing positions established by law. *See Lucia*, 138 S. Ct. at 2051. They would have

continuous duties, set forth in the bills, to decide whether to publicly disclose governmental records. The fact that the Board would terminate in three to four years, H.R. 1272, § 6(n)(1), or four to five years, S. 3191, § 5(n)(1), would not detract from the continuing nature of their statutory responsibilities during those terms. *See Constitutionality of the Ronald Reagan Centennial Commission Act of 2009*, 33 Op. O.L.C. __, *2 (Apr. 21, 2009).

2. Because Board members would be principal officers, the Constitution requires that they be appointed by the President with the advice and consent of the Senate. U.S. Const. art. II, § 2, cl. 2. The Appointments Clause divides officers between principal officers—who are supervised and removed directly by the President—and inferior officers, “whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.” *Edmond v. United States*, 520 U.S. 651, 663 (1997). The Board members would be principal officers, because they would be subject to supervision and removal by the President alone, and they could render final decisions without the approval of anyone else (in some cases, even without the approval of the President). *Edmond*, 520 U.S. at 664–65.

The Constitution constrains Congress’s authority to impose limits upon the candidates whom the President may nominate as principal officers. “The only congressional check that the Constitution places on the President’s power to appoint ‘principal officers’ is the advice and consent of the Senate.” *Common Legislative Encroachments on Executive Branch Authority*, 13 Op. O.L.C. 248, 250 (1989) (“*Common Legislative Encroachments*”); *see Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 487 (1989) (Kennedy, J., concurring in the judgment) (“No role whatsoever is given either to the Senate or to Congress as a whole in the process of choosing the person who will be nominated for [the] appointment.”). The Constitution requires sufficient “scope for the judgment and will of the person or body in whom the Constitution vests the power of appointment”—here, the President. *Civil-Service Commission*, 13 Op. Att’y Gen. 516, 520–21 (1871). Further, the President must have particular leeway in choosing principal officers whose duties implicate sensitive executive functions. *See Constitutionality of Statute Governing Appointment of United States Trade Representative*, 20 Op. O.L.C. 279, 280–81 (1996) (finding it unconstitutional to bar anyone who directly represented a foreign entity in a trade dispute from being the U.S. Trade Representative). The Senate has the constitutional authority to review and approve the President’s nominees, but Congress may not otherwise impose qualification requirements that unduly constrain his discretion.

3. The Cold Case bills, however, would violate these constitutional principles. The Senate bill would provide for appointment by the President with the advice and consent of the Senate, but it would attach a litany of restrictions on candidates for the Board that, like the JFK Act, would unconstitutionally impair the President’s options in selecting nominees. Congress would exclude many experienced prosecutors and law enforcement professionals from membership, because prior involvement in *any* federal, state, or local “investigation or inquiry . . . relating to any civil rights cold case” would be disqualifying. S. 3191, § 5(b)(3)(A). Nominees would have to be “distinguished individuals of high national professional reputation in their respective fields.” *Id.* § 5(b)(3)(B). At least one of the five Board members would have to be a professional historian, while another would have to be a lawyer. *Id.* § 5(b)(3)(C). Nominees must also be “capable of exercising [] independent and objective judgment” and must

“possess an appreciation of the value of [cold case records] to the public, scholars, and government.” *Id.* § 5(b)(3)(B).

Taken together, these criteria would leave the President with insufficient discretion to appoint the principal officers charged with the task of deciding whether to disclose potentially sensitive government records. The President would be barred from selecting from perhaps the most knowledgeable pool of individuals: anyone who was involved in any way in a previous investigation involving a civil rights cold case, at any level of government. And the President’s discretion to choose professionals from other relevant fields would be circumscribed by the requirements to choose a lawyer and a historian for two of the Board’s five seats, on top of other requirements. The JFK Act imposed these same restrictions on membership of the Assassination Records Review Board, and President Bush objected that those qualification restrictions interfered with his authority to select appropriate principal officers under the Appointments Clause. 1992 Signing Statement at 2005.

The House bill would compound these constitutional problems. Principal officers like the Board’s members may be appointed only by the President with the Senate’s consent. U.S. Const. art. II, § 2, cl. 2. Yet the House bill would prescribe that one Board member is to be appointed by the President alone and the remaining four members are to be appointed by leaders of Congress—the Speaker of the House, the House Minority Leader, the Senate Majority Leader, and the Senate Minority Leader. H.R. 1272, § 6(d)(1)(A)–(E). Allowing members of Congress to appoint members of a Board that is part of the Executive Branch would also independently violate the separation of powers because Congress is constitutionally prohibited from appointing anyone who would exercise executive power. *See Bowsher v. Synar*, 478 U.S. 714, 726 (1986). As drafted, the House bill would impose restrictive qualifications, require consideration of the recommendations of private citizens, and set tight time limits on appointments. *Id.* § 6(d)(2)–(3). These appointment mechanisms all would violate the Appointments Clause.

Finally, and similar to the JFK Act, the House bill would impermissibly dictate the timing of presidential nominations. Before selecting Board members, both bills would provide that the appointing authority shall receive lists of candidates “recommended by the American Historical Association, the Organization of American Historians, the Society of American Archivists, and the American Bar Association,” which would have at least 60 days to submit recommendations. H.R. 1272, § 6(b)(2)(B)–(C); S. 3191, § 5(b)(2)(B)–(C) (60 days, extendible for up to another 60 days). The Senate bill would provide that the President “may consider” these candidates for nomination to the Senate and thus would not constrain the President’s appointment authority. But the House bill would provide that the appointment official—either a member of Congress or the President—“shall consider” these candidates. H.R. 1272, § 6(b)(2)(B); S. 3191, § 5(b)(2)(B). The appointment power would therefore be conditioned and delayed upon the actions of private groups. Even if the House were to fix the appointment mechanism in its bill to provide for appointment by the President with the advice and consent of the Senate, this restriction would be unconstitutional. *See* 1992 Signing Statement at 2005. Congress may not constitutionally require the President to wait upon an appointment until after he has received recommendations from other members of the Executive Branch. The intrusion here would be even greater: the President would have no ability to supervise the private groups suggesting appointees, and thus would lack even indirect means of influencing the timing of their recommendations.

C. Removals

Both bills would also unconstitutionally restrict the President's authority to supervise the Executive Branch by prohibiting the President from removing Board members absent cause. *See* H.R. 1272, § 6(h)(1)(B) (authorizing the President to remove Board members only for "inefficiency, neglect of duty, or malfeasance in office"); S. 3191, § 5(f)(1)(B) (authorizing the President to remove Board members only for "inefficiency, neglect of duty, malfeasance in office, physical disability, mental incapacity, or any other condition that substantially impairs the performance of the member's duties"). Congress may not impose removal restrictions on officers if those restrictions would unduly interfere with the President's exercise of a core Article II function. *See Morrison v. Olson*, 487 U.S. 654, 689–90 (1988); *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 169 (1996) ("*Separation of Powers*"). "[R]estrictions on the President's power to remove officers with broad policy responsibilities in areas Congress does not or cannot shelter from presidential policy control clearly should be deemed unconstitutional." *Separation of Powers*, 20 Op. O.L.C. at 169.

The President's constitutional obligation to execute the laws carries with it the authority to remove executive officers. "Because the power to remove is the power to control, restrictions on removal power strike at the heart of the President's power to direct the executive branch and perform his constitutional duties." *Common Legislative Encroachments*, 13 Op. O.L.C. at 252. The Supreme Court held in *Myers v. United States*, 272 U.S. 52 (1926), that the President's "power of removal" is "an indispensable aid" to his ability to meet his "responsib[ility] under the Constitution for the effective enforcement of the law." *Id.* at 132–33. And in *Morrison v. Olson*, 487 U.S. 654 (1988), the Court stated that "*Myers* was undoubtedly correct in its holding, and in its broader suggestion that there are some 'purely executive' officials who must be removable by the President at will if he is to be able to accomplish his constitutional role." *Id.* at 690.

The removal restrictions proposed in the bills would interfere with the President's core constitutional prerogative to decide whether to disclose information subject to executive privilege. Instead of leaving such decisions to the President, both bills would vest those decisions in a Board that would solely answer to the President and whose members could be removed only for specified causes. "Congress may not . . . provide Executive Branch employees with independent authority to countermand or evade the President's determinations as to when it is lawful and appropriate to disclose classified information," let alone all other types of privileged information. *Applicability of the Foreign Intelligence Surveillance Act's Notification Provision to Security Clearance Adjudications by the Department of Justice Access Review Committee*, 35 Op. O.L.C. ___, at *8 (June 3, 2011). That is why the Supreme Court emphasized the extent of presidential supervision over the General Services Administration when approving of legislation giving that agency responsibility for former President Nixon's records, which included privileged materials. *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443–44 (1977). The Court explained that professional archivists' review of former Presidents' records "constitute[d] a very limited intrusion by personnel in the Executive Branch sensitive to executive concerns," *id.* at 451, in light of their supervision by the Administrator of General Services, who was "himself an official of the Executive Branch, appointed by the President," *id.* at 441, "subject to the direction and control of the President," and freely removable by the President, 40 U.S.C.

§ 302. Congress may not insulate Executive Branch decision-makers exercising core executive functions from plenary presidential supervision.

The removal restrictions here differ from those instances where the Supreme Court has upheld limited restrictions on the President's authority to remove principal officers. As the Supreme Court recently recognized in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 493 (2010), the Court has upheld for-cause removal restrictions on principal officers who perform "quasi-legislative" and "quasi-judicial functions." *See id.* (citing *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935)); *see also Wiener v. United States*, 357 U.S. 349 (1958) (holding that Congress could insulate members of a War Claims Commission from at-will removal because their work had an "intrinsic judicial character"). Those cases, however, do not apply to members of the Board, who exercise "purely executive functions." *Humphrey's Ex'r*, 295 U.S. at 627; *see also Separation of Powers*, 20 Op. O.L.C. at 169–70. The Board members' authority to review and disclose confidential Executive Branch information directly relate to the President's execution of the laws, and therefore, must ultimately be exercised only by officers subject to direct presidential control. Congress may not use removal restrictions on principal officers such as the Board members as an indirect means of compromising the President's control over this core executive function. *Cf. Morrison*, 487 U.S. at 695–96 (allowing "good cause" removal restriction on independent counsel even though she exercised executive power, because she was an inferior officer with a narrow ambit); *Free Enter. Fund*, 561 U.S. at 495 (emphasizing that *Morrison* concerned the "status of inferior officers" and the specific "circumstances" of the independent-counsel statute).

II. Policy Concerns

The proposed legislation sets forth a presumption of disclosure, as a well as mechanisms to ensure disclosure, of all civil-rights era cold case records. In addition to the constitutional issues discussed above, there are other significant hurdles (*e.g.*, statutory, evidentiary, or policy-based) to releasing fulsome records to the public on cold cases. For example, (1) information involving juveniles is generally sealed, even long after the proceedings have ended; (2) release of certain information that could present a victim in an unfavorable light (whether the allegation about the victim is true or false) might be precluded by the Crime Victims' Rights Act, and other statements might impinge on the privacy concerns of the family of a victim; (3) release of Personally Identifiable Information, while old, could nonetheless result in identity theft or other issues, and it is Department policy not to release such information; and (4) release of information might pose a security risk to subjects, witnesses, or their descendants.

A. Undue Burden and Limited Resources

This legislation would place an undue burden on Department of Justice's Civil Rights Division employees and divert limited staff resources from mission-critical work to meet the cumbersome deadlines set forth in the Act. The Senate bill would provide two years to transmit to the National Archives all cold case records that can be disclosed, S. 3191, § 3(e)(1), but the House bill would provide only 300 days, H.R. 1292, § 5(a)(1). This would require attorneys in the Criminal Section of the Civil Rights Division to immediately review voluminous materials in all potential cold case records to identify whether they are appropriate for disclosure or qualify

for an exception. Any record exempted from disclosure must then be re-reviewed or re-redacted not later than December 31 of each year. H.R. 1292, § 5(c)(1); S. 3191, § 3(f)(1). Explanations for why records are not disclosed are required to be published in the Federal Register, which is a long and burdensome process. Absent the grant of additional resources and personnel, compliance with this legislation would require the Civil Rights Division to divert limited resources from the criminal enforcement of civil rights statutes, including the important task of investigating and prosecuting modern-day hate crimes.

B. Public Disclosure of Records under Freedom of Information Act

Section 2 of the House bill mischaracterizes the realities of the Freedom of Information Act ("FOIA"). Section 2 of the House bill states: "Legislation is necessary because section 552 of title 5, United States Code (commonly known as the Freedom of Information Act), as implemented by the executive branch, has prevented the timely and adequate public disclosure of records relating to civil rights cold cases." H.R. 1272, § 2(5). FOIA was designed to ensure an informed citizenry, but it simultaneously recognizes that there is a need to balance the right of the public to know with the need for the government to protect certain information. The Privacy Act and FOIA provide important protections, particularly for witnesses and victims of crimes, who may not want their identities known and made machine-readable and searchable on the Internet indefinitely. In disseminating information involving privacy interests of citizens, FOIA must ensure balancing the public's right to know with the interest in protecting information.

C. Definition of Civil Rights Cold Case Records

The definition of Civil Rights Cold Case Records in the Senate bill includes records related to Civil Rights Cold Cases "created or made available for use by, obtained by, or otherwise came into the possession of" Federal agencies and also "any State or local government, or component thereof, that provided support or assistance or performed work in conjunction with a Federal inquiry into Civil Rights Cold Cases." S. 3191, § 2(3)(B). The reach into records that came into the possession of State and local authorities that supported Federal inquiries may raise implementation questions.

D. Required Disclosure After 25 Years

As noted, both bills would require disclosure of all cold case records not later than 25 years after the Act's enactment except in limited circumstances. H.R. 1272, § 5(d)(1); S. 3191, § 3(f)(4). In addition to the constitutional issues identified above, these sections do not take into account domestic privacy concerns and do not reference applicable federal rules, federal statutes, or official Attorney General guidance prohibiting disclosure of certain information. Rather, the House bill would exclude cold case records from the timed disclosure requirement only if disclosure would cause "identifiable harm to military defense, law enforcement, intelligence operations, or the conduct of foreign relations that is of such gravity that the identifiable harm outweighs the public interest in disclosure." H.R. 1272, § 5(d)(1)(A). The Senate bill would exclude cold case records from the time disclosure requirement only if disclosure "would clearly and demonstrably be expected to—(I) cause identifiable or describable damage to national security, military defense, law enforcement, intelligence operations, or the conduct of foreign

relations that is such gravity that it outweighs the public interest in disclosure; or (II) reveal classified information.” S. 3191, § 3(f)(4)(A)(i). This can be particularly problematic in instances where individuals involved in civil rights investigations are still alive. This may be the case if the crime occurred when a witness or victim was a child. The witness or victim may not want their personal information or involvement in an inquiry known, including for example, witnesses and victims of crimes who could be subject to harassment or retaliation.

It is our position that applicable federal statutes, federal rules, official Attorney General guidance, court recognized privileges and legal precedent, and existing FOIA procedures governing disclosure already reflect a determination that the harm resulting from disclosure outweighs the public interest in disclosure. The proposed legislation contravenes the Department’s interests by taking decisions out of the hands of either the Department or a court that has experience in weighing competing interests and instead places decision authority with an independent Review Board. Furthermore, Congress already weighed government interests against the public’s need to know when enacting FOIA. Through FOIA, “Congress sought ‘to reach a workable balance between the right of the public to know and the need of the Government’” to protect certain information, and the FOIA’s “broad provisions favoring disclosure, coupled with the specific exemptions, reveal and present the ‘balance’ Congress has struck.” *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152–53 (1989).

E. FOIA Exemption (b)(6)—Grounds for Postponement of Public Disclosure of Records

The House bill would allow postponement of public disclosure of cold case records when “there is clear and convincing evidence that . . . [t]he public disclosure of the cold case record could reasonably be expected to constitute an unwarranted invasion of personal privacy, and that invasion of privacy is so substantial that the protection of privacy outweighs the public interest.” H.R. 1272, § 8(c)(3). The Senate bill would allow postponement when “disclosure would clearly and demonstrably be expected to . . . constitute an unwarranted invasion of personal privacy.” S. 3191, § 4(3).

The agencies and courts are quite familiar with FOIA exemption (b)(6), for information whose disclosure “would constitute a clearly unwarranted invasion of personal privacy,” and exemption (b)(7)(C), for information compiled for law enforcement purposes whose disclosure “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” FOIA and the Privacy Act already require a balancing of protection of privacy and the public interest, as established in court cases for decades. The House bill additional language—that the invasion of privacy be “so substantial” that privacy protection outweighs the public interest—is unnecessary and would cause confusion and potentially unnecessarily conflicting opinions in the agencies, with the Archivist, the Cold Case Records Review Board, and the courts.

The “clear and convincing evidence” standard in the House bill also would cause confusion. The House bill does not adequately explain the definition of “clear and convincing evidence” in which a record “could reasonably be expected” to constitute an unwarranted invasion of personal privacy. It could be argued that the clear and convincing evidence standard conflicts with, and renders ineffective, the “reasonably be expected” language.

F. Grand Jury Material

With respect to grand jury material, the government has adhered to a litigating position that grand jury material may not be disclosed simply because it is old and of interest to a scholar or the public at large. Brief for Appellant, *Pitch v. United States*, No. 17-15016 (11th Cir. filed Feb. 2, 2018); Corrected Brief for Respondent-Appellant United States of America, *Carlson v. United States*, 837 F.3d 753 (7th Cir. 2016) (No. 15-2972), 2015 WL 8069332; Department of Justice's Opposition to Petitioner's Motion for Release of Grand Jury Material in the Matter of *United States v. John Joseph Frank*, No. 493-57 (D.D.C. 1957, 1959), *McKeever v. Holder*, No. 13-00054 (D.D.C. filed June 3, 2013). The government's position is that disclosure of grand jury material on the basis of scholarly or public interest is not grounded in Federal Rule of Criminal Procedure Rule 6(e). The proposed legislation would release grand jury materials where there is a particularized need for the material, undermining this position. The government has previously proposed amending Rule 6(e) to allow disclosure of such information, but it is the government's position that Rule 6(e) should incorporate a balancing test, which takes into consideration the interests of all affected parties, to ensure that the goals of the rule are met.

G. Rules of Construction

Both bills state that, when the Act requires transmission of a record to National Archives and Records Administration for public disclosure, "it shall take precedence over any other law, . . . judicial decisions construing such law, or common law doctrine that would otherwise prohibit such transgression or disclosure." The bills appear to have been drafted based on concerns that the Executive Branch has not released civil rights cold case records in a timely and adequate manner. H.R. 1272, § 10(a); S. 3191, § 9(a)(1). The House bill specifically refers to FOIA as one reason for these issues. See H.R. 1272, § 2(5). As stated above, the Privacy Act and FOIA are tools to protect private information of witnesses and victims of crimes, who may not want their identities known and made machine-readable and searchable on the Internet indefinitely.

H. Uncertainty of Future Requests

Finally, enactment of such a bill may well be the first slide down a "slippery slope." Civil rights cold cases are very often of particular and intense interest to the country and the public; however, other kinds of cases, such as those involving wide-scale public corruption, terrorism, or historically high-profile crimes, are likely also to be of interest. That might include, in the civil rights context, requests to review cases alleging police misconduct that were not prosecuted. Were this legislation to take effect, we fear that there may well be future requests to access law enforcement or investigative records in other kinds of cases until there is no presumption left that the secrecy of an investigation must be maintained unless a defendant is indicted. Instead, everyone would be aware that, in time, information would become public. Once this precedent is established, there would be increasing requests to move up the time frame for release, thus undermining the secrecy surrounding criminal investigations that is both necessary to their success and that protect persons who are not indicted from any stigma that might attach to their having been investigated.

Thank you for the opportunity to present our views. The Department of Justice looks forward to working with the Committee to address these concerns. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to the submission of this letter.

Sincerely,

A handwritten signature in cursive script that reads "Prim Escalona".

Prim F. Escalona
Principal Deputy Assistant Attorney General